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DISTRICT

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,)	3:73-cv-00127-MMD-WGC
)	
Plaintiff,)	
)	MEMORANDUM OF PRINCIPAL
WALKER RIVER PAIUTE TRIBE,)	DEFENDANTS CONCERNING
)	DISCOVERY AND MOTION
Plaintiff-Intervenor,)	SCHEDULE AND PROCEDURE
)	
v.)	
)	
WALKER RIVER IRRIGATION DISTRICT,)	
a corporation, et al.,)	
)	
Defendants.)	

1. Introduction

Pursuant to the Stipulated Scheduling Order and Discovery Plan (ECF 2437), the United States and Walker River Paiute Tribe (“Tribe”), and the Walker River Irrigation District, the Nevada Department of Wildlife, Lyon County, Centennial Livestock, Desert Pearl Farms, LLC, Peri Family Ranch, LLC, Peri & Peri, LLC and Frade Ranches, Inc., The Schroeder Group, California State Agencies (California State Water Resources Control Board, California Department of Fish and Wildlife and the California Department of Parks and Recreation), and Mono County, California (the “Principal Defendants”), and Mineral County

1 and the Walker Lake Working Group were to submit a proposal to the Court on or before
2 December 16, 2019 concerning, among things, coordination of discovery, including sharing
3 discovery, scheduling discovery, and other matters related to discovery and concerning matters
4 related to dispositive or partially dispositive motions (the “Discovery/Motion Proposal”).

5 Pursuant to the Minute Order of August 8, 2019 (ECF 2560), the Court scheduled a
6 Status Conference for December 18, 2019 at 10:00 a.m. to, among other things, issue any
7 orders needed to resolve disputes, if any, concerning the Discovery/Motion Proposal among the
8 parties, and to amend the Scheduling Order accordingly, and further directed the United States
9 to prepare an agenda for that Status Conference to be submitted on or before December 13,
10 2019.
11

12 The United States and Walker River Tribe and the Principal Defendants exchanged
13 drafts of Discovery/Motion Proposals, and conferred and met in-person to attempt to resolve
14 the areas of disagreement between them. Based upon the parties’ exchange of those drafts and
15 their conference, it was clear that the parties had common ground, but also continued to have
16 significant differences between them concerning the content of the Discovery/Motion Proposal.
17 In order to give the parties more time to reach an agreement on some or all of those differences,
18 the Court vacated the Status Conference, and gave the parties additional time to confer and
19 attempt to resolve those differences. The Court has scheduled a Status Conference for
20 February 19, 2020.
21

22 The parties have not resolved all of their differences. On January 30, 2020, the parties,
23 through the United States, filed the Submission Re: Proposed Scheduling Order and Discovery
24 Plan (ECF 2598) (the “Submission”). Attached to that Submission as Exhibit A is the most
25 recent proposal of the United States and Tribe, and attached to it as Exhibit B is the most recent
26 proposal of the Principal Defendants. The Submission in paragraph 4 identifies the paragraphs
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28

1 of Exhibit A (ECF 2598-1) and Exhibit B (ECF 2598-2) where the parties are in agreement and
2 the paragraphs where the parties are in disagreement.

3 On February 3, 2020, the Court issued a Minute Order (ECF 2599) directing the parties
4 to provide “a side-by-side comparison of the parties’ competing provisions and suggestions.”
5 The side-by-side Comparison was submitted on February 12, 2020 (ECF 2602). The Principal
6 Defendants file this Memorandum to further explain and support their position on the
7 paragraphs where there is disagreement. The Memorandum follows the organization of the
8 side-by-side Comparison (ECF 2602-1). For the convenience of the Court, that Comparison is
9 also attached hereto as Exhibit A.
10

11 **2.b. Period of Discovery.**¹

12 Perhaps the most significant disagreement between the parties involves the Discovery
13 Cut-Off Date and the schedule for discovery which results from that date. Subject to the
14 addition of 45 days to account for the extension of time granted by the Court to submit a
15 proposal, the United States and Tribe propose to adhere to the June 1, 2021 discovery cut-off
16 date included in the March 7, 2019 Scheduling Order (ECF 2437). The Principal Defendants
17 propose that the date for completion of discovery be changed to October 1, 2022, assuming that
18 the Court resolves these issues on or about March 1, 2020. That period of discovery is also at
19 the center of the dispute between the parties concerning the schedules proposed in paragraph 8
20 for expert reports and expert depositions, and in paragraph 11 for lay depositions.
21

22 The Discovery cut-off date in the March 7, 2019 Scheduling Order of June 1, 2021² was
23 selected in a vacuum. At the time the date was selected, the Principal Defendants did not have
24 the United States’ and Tribe’s Detailed Statement of Claims. They did not have their Second
25

26
27 ¹ The headings in this Memorandum follow the headings in the side-by-side Comparison.

28 ² The United States and Tribe propose a discovery cut-off date of July 16, 2021, which is the Scheduling Order date plus the 45 day period granted in the Court’s Order of December 12, 2019 (ECF 2591).

1 Amended Counterclaims, and they did not have their Initial Disclosures, which included
2 voluminous documents. In the normal course of proceedings, all of those things, except,
3 perhaps, the Detailed Statement of Claims, would have been exchanged prior to the issuance of
4 a Scheduling Order. Moreover, from the time these claims were first asserted in 1992, and up
5 to and including the present time, the original Case Management Order and the Supplemental
6 Case Management Order have prohibited anyone from undertaking any discovery and filing
7 any motions, except the limited jurisdictional motions which were allowed to be filed in 2013
8 and which resulted in a hiatus in all litigation in the District Court from 2015 to late 2018 while
9 the matter was pending in the Ninth Circuit Court of Appeals.
10

11 When the Scheduling Order was prepared, if the Principal Defendants had the Detailed
12 Statement of Claims, the further amended pleadings, and most importantly the Initial
13 Disclosures of the United States and Tribe, they would have known that the discovery period
14 needed to be longer. The United States' Initial Disclosures appear to identify some 28,000
15 pages of material, and the Tribe's Initial Disclosures appear to identify some 3,585 pages of
16 material. The United States' Initial Disclosures identifies 15 persons likely to have
17 discoverable information. And, it appears that all 15 of those persons are potentially expert
18 witnesses. The Tribe's Initial Disclosures identifies 8 persons likely to have discoverable
19 information, some of whom may be expert witnesses. The Tribe also describes by category and
20 location additional documents, including Reservation historical documents which may be
21 located in the museum building or at the tribal offices on the Reservation. Accordingly, it is
22 apparent that when the deadlines set forth in the Scheduling Order were established, only the
23 Plaintiffs knew the full scope of witnesses, including experts, documents and details of their
24 case, resulting in the establishment of deadlines to the prejudice of the Principal Defendants.
25

26 Moreover, from discussions with the United States and Tribe, it appears that many of
27 the historic records related to this matter may be stored at the American Indian Records
28

1 Repository in Lenexa, Kansas. Apparently, in order for the Principal Defendants to have
2 access to those records, special procedures beyond the control of the parties will need to be in
3 place to access those documents. Those procedures are not yet in place, and at this point, what
4 they will require is not known.

5
6 In addition, the Principal Defendants are being asked to coordinate their discovery and
7 their filing of motions and briefs. They have agreed to do that to the extent feasible. That
8 coordination, which involves a group of seven or eight lawyers located in different
9 communities and in two different states, with numerous clients, who have somewhat differing
10 interests, will take time. That time needs to be recognized in establishing the discovery cut-off
11 date and in many of the other dates in the proposed schedule if the Plaintiffs wish to have the
12 meaningful coordination of discovery and motions they seek. Simply put, coordinated
13 discovery and coordinated motions among the Principal Defendants takes additional time, and
14 the discovery and motion schedule should take that fact into account. Plaintiffs want
15 coordinated discovery and motion practice (and the Principal Defendants believe it is
16 appropriate when feasible), but Plaintiffs give no consideration to the time it takes to coordinate
17 discovery and motions among multiple parties represented by separate counsel.

18
19 **2.c. and d. Disclosure of Lay Witnesses and Disclosure of Expert Witnesses.**

20 The Principal Defendants propose that lay witnesses be disclosed as the parties become
21 aware of them as discovery progresses. Those disclosures will be supplemented as required by
22 Rule 26(e)(1). Experts will be disclosed at the time their expert report is due. Without
23 undertaking some discovery, the Principal Defendants are not in a position to disclose or
24 designate lay and expert witnesses any sooner. Because, even under the United States' and
25 Tribe's proposal, experts cannot be deposed before they have provided their expert reports,
26 there seems to be no reason why they need to be disclosed before then.
27
28

1 The United States and Tribe propose disclosure of lay and expert witnesses on April 1,
2 2020, with an obligation to supplement as required by Rule 26(e)(1). In addition, as is apparent
3 from the side-by-side Comparison, Exhibit A at para. 11. Depositions, the United States and
4 Tribe would require depositions of lay witnesses relied upon by Defendants to support
5 affirmative defenses to take place between August 17, 2020 and November 16, 2020. That
6 distinction should not be adopted by the Court. It will only lead to unnecessary litigation.
7

8 Without undertaking some discovery to know more about the bases and support for
9 Plaintiffs' claims, it is not possible to identify a lay witness for an affirmative defense. For
10 example, until the Principal Defendants know why the claim for Weber Reservoir, which could
11 have been brought before or even as it was being built, was not brought until now, they really
12 cannot identify witnesses, expert or lay, to support affirmative defenses to the claim. Another
13 example relates to finality defenses. Before they can even know if they need an expert or
14 experts related to those defenses, the Principal Defendants may need to know more about what
15 the attorneys prosecuting the original action knew or should have known about Weber Dam,
16 and what, if anything, was said about a water right to fill its reservoir and how that relates to
17 the present legal theory or theories of the United States and Tribe.
18

19 Moreover, many of the "affirmative defenses" are, in essence, a more detailed denial of
20 the legal conclusions in the amended claims of the United States and Tribe. The use of a
21 distinction between witnesses, whether lay or expert, who support affirmative defenses from
22 those who merely support a position disputing the U.S. and Tribe case-in-chief, could, and
23 likely would result in more disputes, and if they are resolved too late in the process, could be
24 very detrimental.
25

26 The Principal Defendants will disclose lay witnesses as they become aware of them as
27 discovery progresses. They will supplement those disclosures as required by Rule 26(e)(1).
28 They will disclose experts at the time their expert report is due as provided below, all without

1 regard to whether they dispute an element of the case-in-chief of the Tribe and United States or
2 address an element of an affirmative defense, or both.

3 **4. Dispositive Motions and Motion Coordination.**

4 The United States and Tribe distinguish between dispositive motions which do not rely
5 on material outside the pleadings, and those which rely on such outside materials. Under their
6 proposal, the former may be filed at any time, and the latter may only be filed once discovery is
7 complete. *See*, side-by-side Comparison, Exhibit A at para. 4. The Federal Rules of Civil
8 Procedure do not contemplate such a distinction. In fact, and by way of example, motions can
9 be made on alternative grounds, and a motion under Rule 12 can be transformed into a motion
10 under Rule 56 under controlling precedent, further negating the distinction the United States
11 and the Tribe attempt to draw in this case. *See*, Fed. R. Civ. P., Rule 12(d); 2 Moore's, Federal
12 Practice and Procedure ¶ 12.34[3][a] (3rd Ed. 2019).

13
14
15 The Principal Defendants propose that motions may be filed at any time, subject to a
16 final deadline of 30 days after the close of discovery, or October 31, 2022. They do not intend
17 to file motions prematurely, but cannot agree that there will be no opportunity to eliminate or
18 narrow the issues in this case by motion until it has been fully prepared based upon an
19 assumption that all of the issues raised and all of the claims will go to trial. They continue to
20 believe that there are certain issues which ought to be raised early in the process, whether or not
21 they are supported by material outside of the pleadings. The resolution of those issues may
22 either obviate the need for certain discovery, preparation for trial on those and other related
23 issues, or may result in a willingness to resolve some issues by agreement.

24
25 The scope of this matter, including the number of claims, the number of issues and the
26 number of participating defendants, who to a certain extent have somewhat differing interests,
27 makes it difficult to commit to one brief on one issue. Nevertheless, the Principal Defendants
28 will coordinate, to the extent feasible, the filing of motions, the grounds for motions, and briefs

1 supporting motions. They will do their best to file joint motions and joint briefs. However, it
2 may be possible, if not likely, that one or more defendants will decide to file a separate motion
3 and brief, or just a separate brief, and they cannot prevent that, and the Court should not order
4 it. However, they will do their best to avoid it.

5
6 They agree that there will be no page limit on briefs which address a common issue in a
7 single brief. To the extent that that is not the case, unless the Court orders otherwise, the Local
8 Rules concerning page limits should apply. Extended periods are proposed for responses and
9 replies to dispositive or partially dispositive motions, 90 days and 45 days, respectively.

10 **6. Written Discovery Requests.**

11 The United States and Tribe propose that written discovery be limited to a four-month
12 time frame, April 1, 2020 to July 30, 2020. While it may be that most written discovery will
13 take place early in the discovery process, there is no reason that it should be required to
14 arbitrarily end and not be available later, if needed, while discovery is open. Their proposal
15 does not recognize that discovery is a readily changing and fluid process. For example, a party
16 may serve written discovery, receive responses, and then wish to serve additional written
17 discovery to follow-up on the information received. This occurs in virtually every case, and
18 will certainly occur in a case of this magnitude and complexity. This can occur, too, when
19 depositions are taken and new information is learned from testimony, requiring subsequent
20 written discovery. The United States' and Tribe's proposal ignores how the process works and
21 what is permitted under the discovery rules. The Principal Defendants contend that written
22 discovery need not end any sooner than the close of discovery, in general. Nothing in the
23 Federal Rules of Civil Procedure or the Rules of this Court require it to end any sooner.
24
25

26 In addition, the United States' and Tribe's proposal that documents and responses
27 would only be withheld based on privilege or motion for a protective order defeats the meet and
28 confer process. See side-by-side Comparison, Exhibit A at para. 6. If a party objects to a

1 document request and withholds documents based on the objection, there needs to be time to
2 meet and confer after the objection is lodged before a motion is filed. The parties can initiate
3 that meet and confer during the 30-day response window, but it may not be completed by the
4 time the written response is served. Their proposal suggests that a motion for protective order
5 has to be filed on or before the deadline for responding to discovery.
6

7 **6.a, b and c. Interrogatories, Requests for Production of Documents and Things,**
8 **Requests for Admissions.**

9 The United States and Tribe propose that with respect to all forms of written discovery,
10 the Plaintiffs as a group and the Principal Defendants as a group be limited to a total of 25
11 interrogatories, 25 requests for production, and 25 requests for admission. The Federal Rules
12 in Rule 33(a)(1) allow each party to serve on any other party no more than 25 interrogatories.
13 Neither Rule 34, nor Rule 36, imposes a limit on the number of production or admission
14 requests which may be served. The Principal Defendants recognize that, in appropriate
15 circumstances, the Court may alter what the Rules allow for a variety of reasons. *See, e.g.*, Fed.
16 R. Civ. P., Rule 26(b)(2); 6 Moore, Federal Practice and Procedure at § 26.60 (2019).
17 However, there is no basis for imposing such limits at the outset here.
18

19 Nevertheless, the Principal Defendants, who number twenty (20) but who are
20 represented by a total of seven groups of attorneys, will agree to limit the total number of
21 interrogatories to a total of 175 (25 x 7, for each Principal Defendant group), and will do the
22 same with respect to requests for admission and requests for production of documents. That
23 written discovery will be coordinated through coordinating counsel. However, the Order
24 should allow any party to seek permission to serve additional written discovery either by
25 stipulation or order of the Court. If circumstances arise where discovery being sought justifies
26 further limits, the limits can be imposed at that time when those justifications are known.
27
28

1 **8. Expert Discovery.**

2 The dates for opening expert reports proposed by the Principal Defendants are intended
3 to allow them time to obtain discovery on the claims being asserted, and determine if they will
4 initially require an expert with a report that may not be responsive to a United States and Tribe
5 expert. The notion that experts can provide their reports without the development of the record
6 through the discovery process is not realistic, as experts often need information obtained during
7 discovery to formulate their opinions.
8

9 The dates proposed by the Principal Defendants for responsive expert reports follows
10 the provisions of the March 7, 2019 scheduling Order of six months from the opening report
11 deadline, or September 30, 2021.

12 The dates proposed by the Principal Defendants for rebuttal expert reports also follows
13 the March 7, 2019 Scheduling Order, or 90 days from the responsive expert report deadline, or
14 December 31, 2021.
15

16 The Principal Defendants propose that expert depositions commence 30 days after the
17 last expert report is due, and end August 31, 2022. The schedule would also allow for an
18 earlier deposition date if reasonably necessary for purposes of preparing a responsive or
19 rebuttal expert report with the consent of the relevant party or leave of Court. The three-month
20 expert deposition period proposed by the United States and Tribe will not be sufficient given
21 the likely number of experts to be deposed and the coordination required.
22

23 **11. Depositions.**

24 For the reasons stated above, there is no reason to distinguish between lay witnesses
25 based on whether they do or do not support an affirmative defense. It should be permissible to
26 depose lay witnesses throughout the discovery period. In addition, the time proposed by the
27 United States and Tribe for all expert depositions and the “remaining” lay depositions of three
28 months is not sufficient to coordinate and complete all of the likely depositions that will occur.

13. Documents Located at American Indian Records Repository.

Although it is not a matter of disagreement, it is important to note that at the time of this writing, the special procedures to access records at the American Indian Records Repository are not known to the Principal Defendants. When they become known, there may be a need to amend the Order in some way. Those procedures may very well affect the schedules for discovery and motions.

Dated: February 12, 2020.

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CERTIFICATE OF SERVICE

It is hereby certified that on February 12, 2020, service of the foregoing was made through the Court's electronic filing and notice system (ECF) to all of the registered participants.

Further, pursuant to the *Superseding Order Regarding Service and Filing in Subproceeding C-125-B on and by All Parties* (ECF 2100) at 10 ¶ 20, the foregoing does not affect the rights of others and does not raise significant issues of law or fact. Therefore, the Walker River Irrigation District has taken no step to serve notice of this document via the postcard notice procedures described in paragraph 17.c of the *Superseding Order*.

/ s / Gordon H. DePaoli
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